No. 35653-8-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

BARBARA SAYERS, Appellant,

vs.

WESLEY N. SAYERS and JEAN W. SAYERS, and the Marital Community Composed thereof, Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

The trial court granted summary judgment of dismissal in favor of the defendants because there was no genuine issue of material fact and the defendants were entitled to judgment as a matter of law. The plaintiff has appealed. This court should affirm the trial court's order of dismissal.

STATEMENT OF THE CASE

A. Statement of Facts

At the time of the accident alleged, April 10, 2002, plaintiff/appellant Barbara Sayers was a guest, or licensee, at the home of her parents, defendants/respondents Wesley and Jean Sayers. CP12. She had been staying there since March 9, 2002, recovering from knee surgery. CP11.

On the day before the accident, April 9, 2002, the plaintiff attended a physical therapy appointment at a clinic located on the second floor of a building, and was able to ascend and descend the stairs unassisted. CP38, 40. She was planning on moving back to her own home several days later. CP39, 40.

On April 10, 2002, the plaintiff was in her mother's bedroom seated in a desk chair at a computer desk, working, using the computer

and the phone. CP33-34. At that time she did not require a wheelchair. CP34. She claims she pushed the desk chair back against the queen sized bed and attempted to arise from the chair. She claims the bed moved, causing her to fall and injure her leg. Plaintiff further claims that on previous occasions she had pushed the desk chair back against the bed for stability before arising, and the bed had been in a position against the wall, and therefore did not move. She claims at the time of this accident the bed was not pushed against the wall, and for that reason it did not provide the stability it had on previous occasions. CP12. There is no other evidence.

B. Statement of Procedure

The defendants moved for summary judgment of dismissal on July 11, 2006. The plaintiff responded on September 5, 2006. Argument was heard on September 15, 2006. The court issued a letter ruling on September 28, 2006. The defendants' proposed Order Granting Defendants Summary Judgment of Dismissal was signed and filed on October 20, 2006. The plaintiff filed her appeal on November 17, 2006.

ARGUMENT

A. Standard for Summary Judgment.

Under Civil Rule 56, summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of Law. CR 56; *Hiskey v. Seattle*, 44 Wn.App. 110, 112, 720 P.2d 867 (1986). A material fact is one upon which the outcome of the litigation depends. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The court should grant summary judgment if reasonable persons could reach but one conclusion from all the evidence. *Hiskey*. The object and function of the summary judgment procedure is to avoid a useless trial. *Balise*.

Once the moving party has met its burden of presenting evidence showing that it is entitled to judgment as a matter of law, the burden shifts to the non-moving party to set forth specific facts showing that a genuine issue exists, requiring trial. *Id.* A party seeking to avoid summary judgment cannot simply rest upon the allegations of the pleadings, but must affirmatively present the factual evidence relied upon. *Macky v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983). When the defendant

in a negligence action moves for summary judgment challenging the sufficiency of the evidence of an essential element of the plaintiff's claim, the plaintiff must present sufficient evidence to establish the essential elements of its case. *Bird v. Walton*, 69 Wn.App. 366, 368, 848 P.2d 1298 (1993). A plaintiff alleging negligence must establish the existence of a duty owed, injury, and a breach of the duty which proximately causes the injury. *Id.*

B. Duty is Defined by Status of Guest on Property.

"A property owner's duty of care is defined by the status of the person who enters the property." *Sjogren v. Properties of the Pacific NW, LLC*, 118 Wash.App.144, 148, 75 P.3d 592 (2003). The parties agree that the plaintiff was a social guest or licensee in the defendants' home at the time of the accident. CP12. "A social guest is a person who goes upon the premises of another, with an invitation, express or implied, but for a purpose not connected with any business interest or business benefit to the [owner][occupier]." WPI 120.08.01. *Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955); *Potts v. Amis*, 62 Wn.2d 777, 384 P.2d 825 (1963). A copy of WPI 120.08.01 is attached as Appendix A.

An [owner][occupier] of premises owes to a [licensee] [social guest] a duty of ordinary care in connection with dangerous conditions of the premises of which the [owner][occupier] has knowledge or should

have knowledge and of which the [licensee][social guest] cannot be expected to have knowledge. This duty includes a duty to warn the [licensee][social guest] of such dangerous conditions.

WPI 120.02.01; *Memel v. Reimer*, 85 Wn.2d 685, 538 P.2d 517 (1975), adopting Restatement (Second) of Torts Section 342. A copy of WPI 120.02.01 is attached as Appendix B.

Defendants' position is that it is the "conditions" rule, discussed above, that applies in this case. However, the plaintiff has argued that the "activities" rule applies. The duty owed regarding activities was first set out in *Potts v. Amis*, *supra*. *Potts* involved the swinging of a golf club in close proximity to the plaintiff.

Nevertheless, the law regarding the duty owed to a licensee/social guest for activities of the owner follows the same scheme as that owed for a condition. In *Egede-Nissen v. Crystal Mtn. Inc.*, 93 Wn.2d 127, 132, 606 P.2nd 1214 (1980), the Court noted that *Potts v. Amis*, *supra*, was decided based upon Restatement (Second) of Torts Section 341. That section provides:

> A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety, if, but only if, (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor's activities and of the risk involved.

Restatement (Second) of Torts, Section 341 cited in WPI 120.03.

Because in this case, the defendants were not even in the room with the plaintiff, defendants are not governed by the "activities" rule. But even if they were, the law is the same. There must have been a dangerous condition and there must have been reason to believe the plaintiff would not have knowledge of it.

The duty to a licensee/social guest arises only in connection with dangerous conditions or risky activities on the premises. In this case, there is no dangerous condition or risky activity. There is a perfectly clean and uncluttered bedroom with furniture which is in no way unusual. There is no evidence of any defects of any kind in the room or the furniture. The location of the bed and dresser as clearly demonstrated in the photographs is not in any way unusual and does not obstruct any movement in the room. CP74-86. There is no evidence of any obstruction to the plaintiff's entry into the room.

If it can seriously be argued that the location of the bed was a dangerous condition of the premises, this condition was equally obvious to any person entering or occupying the room. The plaintiff was actually in the best possible position of anyone to observe the location of the bed. She actually entered the room, sat at the desk, and then moved her desk

chair back against the bed, as she had done for a month previously. Even if she never inspected anything prior to that movement, the decreased distance between her chair and the bed due to the bed location would be obvious to her.

Liability in a licensee/social guest situation is based upon a dangerous condition and superior knowledge of the dangerous condition by the owner. Unless these conditions are met, there is no liability.

C. Plaintiff's Argument and Supporting Authority are not on Point.

The plaintiff's arguments on appeal all rely on cases involving invitees. These arguments are not on point and should not be considered. The parties here agree that the plaintiff was a licensee/social guest. Washington provides entirely different duties to invitees versus licensees. These distinctions are discussed in detail in *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986).

Sjogren v. Properties of the Pacific NW, LLC, supra, is not on point. The plaintiff in *Sjogren* was an invitee, not a licensee. Further, that case dealt with a landlord and tenant situation where the landlord had an affirmative duty to maintain common areas in a reasonably safe condition. The duties owed by the defendant in *Sjogren* were entirely different than in this case.

Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 875 P.2d 621 (1994) is also not on point. In *Tincani* the jury decided what the plaintiff's status was, and found that Tincani was a licensee. The jury also found the Zoo at fault. The court ruled that these two determinations created an irreconcilable conflict, requiring a new trial. The court then outlined the duties owed to licensees. The court noted that "First, the landowner must know, or have reason to know, about a hidden danger . . . Second, the licensee must not know or have reason to know, about the dangers presented. . ." *Tincani, supra* at 134.

The *Tincani* court then analyzed the duties owed to invitees, noting that there is a separate set of duties owed to invitees. "In contrast to what a licensee may expect, an invitee 'is . . . entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry.' Restatement (Second) of Torts Section 343, comment *b*." *Tincani, supra* at 138-139. The court then found that the Court of Appeals failed to properly instruct the jury regarding the duties to invitees for known or obvious dangers. It is here that the court discussed Restatement (Second) of Torts Section 343A. The court held that it

> creates a duty to protect invitees even from known or obvious dangers. This occurs when a possessor "should anticipate the harm despite such knowledge or obviousness." . . . Reason to expect harm to the visitor from known or obvious dangers may arise, for

> example, where the possessor has reason to expect that the invitees' attention may be distracted, so that he [or she] will not discover what is obvious, . . .

Tincani, supra at 139.

Thus *Tincani's* application of a duty to protect from "known or obvious dangers" arises only for an invitee, not a licensee. Since the plaintiff in this case is unquestionably a licensee, neither *Tincani*, nor its analysis of Restatement (Second) of Torts Section 343A applies here. While Section 343A was adopted by *Tincani* and reaffirmed in *Sjogren*, it simply does not apply here because this case involves an undisputed licensee, not an invitee. The *Tincani* court noted

> We agree with the *Swanson* [*v. McKain*, 59 Wash.App. 303, 796 P.2d 1291 (1990)] court that a landowner has no duty to warn licensees about open and apparent dangers from a natural condition. As discussed below, a separate set of duties governs a landowner's duties to protect invitees from such dangers.

Tincani, supra, at 135. If this court applied *Sjogren*, *Tincani* and Restatement 343A in this case, it would be elevating the duty owed to a licensee to that of an invitee. If Section 343A's "open and obvious" exception to the duties owed to invitees were applied here, this court would be making new law. The Supreme Court has consistently reaffirmed and refused to blur the distinctions set out by the invitee/licensee/trespasser designations. *Tincani, supra* at 128; *Degel v.*

Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49, 914 P.2d 728 (1996); *Sjogren, supra* at 148.

The plaintiff argues that she has created an issue of fact by suggesting that she was distracted upon entering the room and could not have seen the different position of the bed. As discussed above, there is no law to support this analysis of the duty owed. Rather, because the plaintiff is a licensee/social guest, the court asks only: 1) was this a dangerous condition; and 2) was it a condition of which the plaintiff could not be expected to have knowledge. The court cannot get to a "distraction" analysis because the plaintiff is not an invitee. The *Tincani* court "agree[d] with the *Swanson* court that a landowner has no duty to warn licensees about open and apparent dangers . . ." *Tincani, supra* at 135. No reasonable person could find that the bed placement was dangerous or that the plaintiff could not have seen the bed's placement.

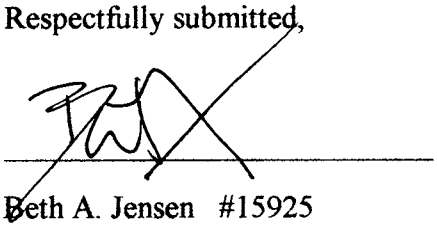
Reasonable persons could reach only one conclusion, and that is that there was no dangerous condition of the premises of which the defendants had knowledge or should have had knowledge and of which the plaintiff could not have been expected to have knowledge. The plaintiff has presented no facts or law that would create a genuine issue of material fact.

CONCLUSION

Defendants request that the court AFFIRM the trial court's summary judgment of dismissal of this case.

DATED this 27th day of March, 2007.

Respectfully submitted,



Beth A. Jensen #15925

Attorney for Respondent

APPENDIX

Appendix A WPI 120.08.01

Appendix B WPI 120.02.01

Appendix C WPI 120.03

Westlaw.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08.01 (5th ed.)

Washington Practice Series TM
Current Through the 2005 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part X. Owners and Occupiers of Land
Chapter 120. Trespasser—Licensee—Social Guest—Invitee

WPI 120.08.01 Social Guest—Definition

A social guest is a person who goes upon the premises of another, with an invitation, express or implied, but for a purpose not connected with any business interest or business benefit to the *[owner] [occupier]*.

Note on Use

Use this instruction if the entrant is invited upon the premises for a purpose not connected with any business interest or benefit to the owner or occupier or if the entrant is invited upon the premises and there is a question whether there was a business interest or benefit to the owner or occupier that would constitute a business invitee relationship. If the entrant is upon the premises without an invitation but with permission, use WPI 120.08, Licensee—Definition, instead of this instruction.

Use either WPI 120.06, Duty to Licensee or Social Guest—Activities or Condition of Premises, or WPI 120.06.01, Duty of Business Proprietor to Customer—Activities or Condition of Premises, with this instruction.

Comment

The definition used in this instruction is a modification of the "licensee" definition found in Dotson v. Haddock, 46 Wn.2d 52, 278 P.2d 338 (1955). The Supreme Court in that case stated that a social guest may be expressly invited onto the premises, but, nevertheless is considered a licensee. Dotson v. Haddock, 46 Wn.2d at 55, 278 P.2d 338. Also see Potts v. Amis, 62 Wn.2d 777, 778, 384 P.2d 825 (1963).

The distinctions between a social guest and an invitee are discussed in detail in Younce v. Ferguson, 106 Wn.2d 658, 724 P.2d 991 (1986).[Current as of May 2002.]

6A WAPRAC WPI 120.08.01

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APPENDIX A

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6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.02.01 (5th ed.)

Washington Practice Series TM
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Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part X. Owners and Occupiers of Land
Chapter 120. Trespasser—Licensee—Social Guest—Invitee

WPI 120.02.01 Duty to Licensee or Social Guest—Condition of Premises

An *[owner] [occupier]* of premises owes to a *[licensee] [social guest]* a duty of ordinary care in connection with dangerous conditions of the premises of which the *[owner] [occupier]* has knowledge or should have knowledge and of which the *[licensee] [social guest]* cannot be expected to have knowledge. This duty includes a duty to warn the *[licensee] [social guest]* of such dangerous conditions.

Note on Use

Use bracketed material as applicable. Use either WPI 120.08, Licensee—Definition, or WPI 120.08.01, Social Guest—Definition, as applicable with this instruction.

Comment

The only common law duty an owner or occupier of land owed to a licensee was to refrain from committing willful or wanton misconduct. See Prosser and Keeton on Torts, § 60, 415 (1985). In Memel v. Reimer, 85 Wn.2d 685, 538 P.2d 517 (1975), the court replaced this standard of care with a duty to exercise reasonable care toward licensees when there is a known dangerous condition on the property that the possessor can reasonably anticipate the licensee will not discover or realize the risks involved. Memel specifically adopts the duty of care set forth in Restatement (Second) of Torts § 342. That section states:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
> (c) the licensees do not know or have reason to know of the condition and risk involved.

Restatement (Second) of Torts, § 342.

APPENDIX B

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.02.01 (5th ed.)

The duty of care owed to licensees and social guests is discussed in both Egede-Nissen v. Crystal Mountain, Inc. 93 Wn.2d 127, 606 P.2d 1214 (1980), and Younce v. Ferguson, 106 Wn.2d 658, 724 P.2d 991 (1986).

In Youngblood v. Schireman, 53 Wn.App. 95, 765 P.2d 1312 (1988), the court discussed the duty of a landowner to warn or protect a licensee against harm by a third person.

The court in Hutchins v. 1001 Fourth Avenue Associates, 116 Wn.2d 217, 802 P.2d 1360 (1991), holds that a possessor of land has no generalized duty to provide security measures on the premises so as to protect those off the premises, including passersby, from third party criminal activity on the premises.

The duty owed to licensees or social guests does not include the duty to warn of natural conditions associated with bodies of water nor to warn of floating debris naturally occurring in bodies of water. Swanson v. McKain, 59 Wn.App. 303, 796 P.2d 1291 (1990).

"[A] landowner has no duty to warn licensees about open and apparent dangers from a natural condition." Whether a natural condition is open and apparent is a question of fact. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 135, 875 P.2d 621, 629 (1994). In Thompson v. Katzer, 86 Wn.App. 280, 936 P.2d 421 (1997) the appellate court affirmed a summary judgment for the defense because the plaintiff-licensee clearly saw and perceived the risk of the snow upon which he slipped.

In Anderson v. Weslo, 79 Wn.App. 829, 906 P.2d 336 (1995), the court affirmed the summary dismissal of the claim of a 16 year-old injured on a neighbor's trampoline; the owners of the trampoline had posted safety rules and required parental permission.[Current as of May 2002.]

6A WAPRAC WPI 120.02.01

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6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.03 (5th ed.)

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Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part X. Owners and Occupiers of Land
Chapter 120. Trespasser—Licensee—Social Guest—Invitee

WPI 120.03 Duty to Licensee or Social Guest—Activities of Owner or Occupier

An *[owner] [occupier]* of premises has a duty to exercise ordinary care in conducting activities to avoid injuring any person who is on the premises with permission and of whose presence the *[owner] [occupier]* is, or should be, aware.

Note on Use

The definitions of licensee and social guest are not needed with this instruction because the duty is the same as to both. If the issue is whether or not there was permission to be on the premises, use WPI 120.01 and WPI 120.02 with this instruction, to submit the trespass issue. Use bracketed material as applicable.

Comment

This instruction is based upon Potts v. Amis, 62 Wn.2d 777, 384 P.2d 825 (1963), which holds that an owner or occupier of land has a duty to exercise reasonable care to avoid injuring a person who is on the land with permission and of whose presence the owner or occupier is, or should be, aware.

The court in Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 606 P.2d 1214 (1980), cited Potts as relying upon the Restatement (Second) of Torts, § 341, for guidance regarding the liability of possessors of land to licensees for injuries resulting from activities on their premises. That section, titled "*Activities Dangerous to Licensees*," provides:

> A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if,
> (a) he should expect that they will not discover or realize the danger, and
> (b) they do not know or have reason to know of the possessor's activities and of the risk involved.

In Dorr v. Big Creek Wood Products, Inc., 84 Wn.App. 420, 927 P.2d 1148 (1996), the Court of Appeals relied on Restatement (Second) of Torts, § 341, comment (a), in holding that a licensee who enters upon land with knowledge of the activities being conducted on the land, may not expect the possessor to alter the possessor's way

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.03 (5th ed.)

of working in order to make the land safe for the licensee. There was evidence in Dorr, however, from which the jury could conclude that the possessor of land had negligently motioned Dorr forward into a dangerous area.[Current as of May 2002.]

6A WAPRAC WPI 120.03

END OF DOCUMENT

CERTIFICATE OF SERVICE

DIANA G. SCAMPORLINA hereby states and declares as follows:

I am the office manager for Richard J. Jensen, P.S. and Associates, attorneys for respondent in the above-entitled action, am over the age of 18, am competent to testify to the facts contained herein, and make this certification based upon my personal knowledge.

On the 27th day of March, 2007, I delivered to ABC Legal Services, Inc. a true and correct copy of the document to which this certificate of service is attached for delivery on March 27, 2007, to the following:

Sandra C. LaCelle
Attorney for Appellant
3330 Kitsap Way
Bremerton, WA 98312-2662

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Fircrest, Washington, this 27th day of March, 2007.

Diana G. Scamporlina